

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.)	<u>C.A. NO. 00-422 (EGS)</u>
)	
VS.)	WASHINGTON, D.C.
)	MAY 22, 2000
Q. TODD DICKINSON)	10:00 A.M.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: MICHAEL H. SELTER, ESQ.
JEFFREY A. SIMENAUER, ESQ.
JEFFREY S. MELCHER, ESQ.

FOR THE DEFENDANT: FRED E. HAYNES, ESQ.
KEVIN BAER, ESQ.

COURT REPORTER: FRANK J. RANGUS, OCR
U. S. COURTHOUSE, RM. 6822
WASHINGTON, D.C. 20001
(202) 371-0545

PROCEEDINGS RECORDED BY ELECTRONIC STENOGRAPHY; TRANSCRIPT
PRODUCED BY COMPUTER.

1 SOMETHING FOCUSED HER ATTENTION ON THE 935 PATENT AND THE
2 TIMING OF THE 294 PATENT IS JUST, IT'S NOT JUST COINCIDENTAL.
3 IT WAS ABOUT TO ISSUE.

4 MR. BAER: WELL, IT WAS ABOUT TO ISSUE, YOUR HONOR,
5 BUT WHAT HAPPENED IS, I DON'T KNOW, TO ANSWER YOUR QUESTION
6 DIRECTLY, I DO NOT KNOW HOW THE DIRECTOR BECAME AWARE THAT WE
7 ISSUED A --

8 THE COURT: DOESN'T THE COURT NEED TO KNOW THAT IN AN
9 EFFORT TO DETERMINE WHETHER THE ACTIONS OF THE GOVERNMENT ARE
10 INDEED ARBITRARY AND CAPRICIOUS?

11 MR. BAER: I DON'T BELIEVE SO, YOUR HONOR, BECAUSE THE
12 ISSUE IS, IS THERE A SCIENTIFIC BASIS, A REASONABLE SCIENTIFIC
13 BASIS, TO WITHDRAW IT? AND IS THAT ARBITRARY AND CAPRICIOUS?
14 PLAINTIFF DOESN'T EVEN CHALLENGE THE REASONABLENESS. NOW, THEY
15 HAVE SOME PROCEDURAL ISSUES THEY ARGUE WITH, BUT THE ACTUAL
16 ISSUES OF THE SCIENTIFIC CONCERNS, THEY DO NOT CHALLENGE. THEY
17 ADMIT THAT THIS IS NOVEL SCIENCE, THIS IS UNKNOWN. THEY SAY IT
18 WORKS. THEY SAY IT'S DIFFERENT, THAT THEY HAVE TAKEN QUANTUM
19 MECHANICS TO A NEW LEVEL.

20 THE COURT: SO NO ONE, THE PLAINTIFFS ARE NOT ASKING
21 THE COURT TO FOCUS ON THE REASONS LEADING UP TO OR THE FACTS OR
22 CIRCUMSTANCES LEADING UP TO THE DIRECTOR'S CONSIDERATION OF THE
23 935 PATENT?

24 MR. BAER: I DON'T BELIEVE SO. THEY WITHDREW THAT.

25 THE COURT: NO ONE IS CASTING ANY SINISTER ALLEGATIONS

1 (PAUSE) --

2 MR. SELTER: WE'RE SAYING FOR PURPOSES OF THE MOTION
3 FOR SUMMARY JUDGMENT, SINCE THEY DISPUTE IT IN THEIR AFFIDAVIT,
4 WE ARE NOT RAISING THAT AS A POINT, BUT WE DO BELIEVE THAT IT
5 OCCURRED. AND SIGNIFICANTLY, I'VE YET TO HEAR FROM MR. BAER.
6 I MEAN, IT'S A FACT IT'S DISPUTED, BECAUSE WE WANT A DECISION
7 ON --

8 THE COURT: YOU CAN'T HAVE IT BOTH WAYS, COUNSEL.
9 YOU'RE NOT RAISING IT AS A POINT. CORRECT?

10 MR. SELTER: WE'RE NOT RAISING IT AS A POINT.

11 THE COURT: ALL RIGHT.

12 MR. SELTER: BUT WE WILL NEED A DECISION TO BE
13 RESOLVED FOR PURPOSES OF THE SUMMARY JUDGMENT.

14 THE COURT: I JUST WANT THE RECORD CLEAR ON THAT.
15 ALL RIGHT, THANK YOU.

16 ALL RIGHT.

17 MR. BAER: YOUR HONOR, EVEN --

18 THE COURT: IT'S NOT A POINT.

19 MR. BAER: OKAY. I WOULD EVEN SAY, YOUR HONOR, YOU
20 COULD IMAGINE IN YOUR HEAD ANY SCENARIO OF HOW WE LEARNED ABOUT
21 IT. A BLIMP FLYING OVER US. IT DOESN'T MATTER, BECAUSE WHAT
22 MATTERS, YOUR HONOR, IS THE DECISION ITSELF. IS THERE A
23 REASONABLE, NON-ARBITRARY REASON BASED ON THE SCIENCE, BASED ON
24 THE PATENTABILITY, TO WITHDRAW THIS APPLICATION FROM ISSUE?
25 THE ANSWER IS YES. PLAINTIFF DOES NOT CHALLENGE THAT.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BLACKLIGHT POWER, INC.

Plaintiff,

v.

Q. TODD DICKINSON
Director of the United States
Patent and Trademark Office

Defendant.

Civil Action No.
00 CV 0422 (EGS)

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND THE SCHEDULING ORDER**

Defendant, Q. Todd Dickinson, Director of the United States Patent and Trademark Office ("Director"), respectfully opposes plaintiff's motion for an open-ended stay because no further stay is warranted and any additional stay will serve as an unjustified restraint against lawful government activity. Although plaintiff fails to ask properly for a preliminary injunction, plaintiff is seeking, in effect, a preliminary injunction against the United States. The motion should be denied for three independent reasons. First, plaintiff's failure to seek a preliminary injunction under Federal Rule of Civil Procedure 65 should summarily preclude the relief requested. Second, assuming that this Court treats plaintiff's motion to amend the scheduling order as a proper motion for a preliminary injunction, then the motion should be denied because plaintiff has failed to articulate any basis for a preliminary injunction. Last, if this Court reviews the merits of a theoretical request for a preliminary injunction, then a preliminary injunction should be denied

Withdrawal occurred after the press brought the subject matter of the issued patent to the attention of USPTO management officials after the issuance of plaintiff's patent.¹² These additional factors weigh against granting the extraordinary relief of enjoining the United States from further examining the pending patent application.

Conclusion

"[I]njunctive relief is an 'extraordinary remedy.'" *DynaLantic Corp.* 937 F. Supp at 11 Plaintiff has provided no basis for restraining the United States from taking lawful and regular government action. *See Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2nd Cir. 1994) ("Injunctive relief should be narrowly tailored to fit specific legal violations."). Plaintiff has wholly failed to articulate reasons under the standard four-part test for determining preliminary injunctions.

For the foregoing reasons, plaintiff's motion should be denied. A proposed order is attached.

August __, 2000

Respectfully submitted,

Wilma A. Lewis
D.C. Bar #358637
United States Attorney

¹² See Exhibit 1: Erik Baard, *U.S. Grants Patent on Novel Hydrogen Energy Source*, DOW JONES NEWSWIRE, (Feb. 18, 2000) (quoting the inventor Mr. Mills and his counsel Mr. Melcher). At the time of the May 22, 2000, hearing, defendant's counsel did not know that a press inquiry on February 17, 2000, by Mr. Baard prompted the review of the still pending applications. If this Court desires, Defendant can submit affidavits to demonstrate that the press inquiry prompted the review.

Of Counsel

Kevin Baer

D.C. Bar # 450192

Marshall Honeyman 9035-
205-4469

Eric Grimes

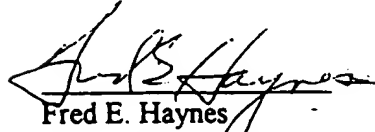
Associate Solicitors

U.S. Patent and Trademark Office

Mark E. Nagle

D.C. Bar #416364

Assistant U.S. Attorney



Fred E. Haynes

D.C. Bar # 165654

Assistant U.S. Attorney

555 4th Street N.W.

Washington, D.C. 20001

(202) 514-7201